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POLAND

POLICING QUARANTINE

VIA APP

Magdalena Brewczyńska

The quarantine obligation and abundance of enforcement measures

The coronavirus pandemic is posing a difficult test for many of the world's democracies, but countries such as Poland, where since 2015 the rule of law has been under threat, may be at a higher risk of crossing a critical red line.

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This dispatch aims at addressing some concerns regarding the way in which certain civil liberties were curtailed in Poland in the name of halting COVID-19. More specifically, it will focus on technology-led measures for the enforcement of quarantine obligations, which invite multiple questions on their legality, necessity, and proportionality in a democratic society.

Compared to most other European countries, Poland had almost six extra weeks to prepare for the outbreak of the coronavirus. To anticipate the upcoming events, already on March 2, 2020, the first emergency bill ('The COVID-19 Act')¹ was adopted. Soon after the first positive diagnosis of COVID-19 was confirmed, various 'corona laws' (not necessarily all backed by the Parliament, but often in the form of executive orders) started to be announced, reaching a total number of 129 by mid-June.² In this difficult-to-navigate maze of newly adopted, amended, and annulled provisions, numerous far-reaching measures significantly affecting fundamental rights and freedoms (including the right to privacy and data protection) were introduced.

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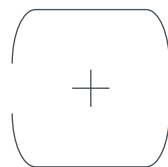
One of the measures that Poland has taken very seriously is quarantine. The existing Act of 2008 on preventing and combating infectious diseases³ allows for the quarantine of persons exposed to an infectious disease or persons who were in contact with a source of the biological pathogen.⁴

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In addition to this, on March 13, 2020, the Polish Minister of the Interior and Administration issued an executive order closing the borders for the foreigners and obliging citizens returning to Poland to undergo a 14-day quarantine.⁵ Shortly thereafter, the obligation was extended to also include all household members of a person in quarantine.⁶ Such a broadly defined personal scope of the quarantine obligation led to an exponential growth in the number of people subject to this measure, and consequently difficulties arose in verifying their compliance with the imposed restrictions. The capacities of the police, who traditionally used to regularly visit the addresses of people in quarantine and request them to look out the window, started to be insufficient. This, in turn, gave rise to the idea of employing a technological solution.

Poland adopted three measures involving technology in the context of monitoring people in quarantine. The most unique concerns a mobile application called 'Home Quarantine', the use of which upon the revision of the COVID-19 Act became a legal obligation applicable to everyone in quarantine.⁷ Interestingly, before the app was made compulsory, the government tried to encourage citizens to use it by proposing a choice: 'either receive unexpected visits from the police, or download this app'.⁸ The app prompts users to share their location data and send selfies on request in order to prove that they are staying put.⁹ Through the use of facial recognition technology and analysis of location information, the state has attempted to enforce the law via the app. Remarkably, the app's privacy policy¹⁰ fails to indicate law enforcement as a purpose of data processing and claims that the processing takes place for the protection of public health.¹¹ Furthermore, it provides for a surprisingly long data retention period, namely six years, with the exception of the pictures, which are supposedly deleted after the end of the 14-day quarantine period. This, together with the fact that the app's database is accessible to several entities (including the police) for the entire data retention period, makes it difficult to disregard the fears of function creep and potential abuses.



The other two measures adopted to monitor people in quarantine involve direct access by the state to location data. First, the prime minister gained a competence to issue an administrative decision that may require the telecommunication service provider to share with provincial governors and other local bodies information about the location of the devices of users on whom containment measures have been imposed. Due to the extraordinary context, such a decision did not allow for an appeal and did not require justification.¹² The lack of transparency is amplified by the fact that neither the government's requests for individual location data, nor responses thereto, are shared with the public.

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Second, through an amendment made to the Telecommunication Act,¹³ the Minister of Digital Affairs was attributed a right to gain access to the location data of infected and quarantined persons from telecommunication service providers.¹⁴ Besides being questionable from a legal standpoint,¹⁵ the way of introducing such an intrusive exception to the principle of confidentiality of telecommunication data (including location data) is very worrisome from the perspective of the legislative drafting process. The provision creating the new competence was smuggled into an act known as 'Anti-Crisis Shield 2.0.',¹⁶ the main purpose of which was to create stimulus measures for the economy harmed as a result of the coronavirus.

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Tough restrictions without pronouncing the state of emergency

The above concerns regarding the measures adopted in Poland should not overshadow the broader constitutional picture, and more specifically the fact that all the 'corona laws' were adopted without a formal declaration of the state of emergency. The reason to refrain from recalling Chapter XI ('extraordinary measures') of the Polish Constitution,¹⁷ which contains rules for 'switching the country into a special legal regime meant to overcome exceptional dangers'¹⁸ seems to have been influenced by the 2020 presidential election.¹⁹

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Whilst, during the state of emergency, the introduction of certain restrictions of rights and freedoms enshrined in the

20 constitution may be permissible, without declaring such
 a state, only the general derogation clause can apply.²⁰
 Accordingly, any limitation must be 'imposed only by
 statute, and only when necessary in a democratic state for
 the protection of (...) health (...), or the freedoms and rights
 of other persons (...) [and] shall not violate the essence of
 21 freedoms and rights.'²¹ Yet, the mere fact that many of the
 measures, including the compulsory quarantine upon arrival
 from abroad, were introduced by means of executive orders
 (i.e. lower-level legislation and not statutes) brings their
 constitutionality into serious doubt.

The way forward

At the time of writing in mid-June 2020, when the epidemic curve appears to have been flattening across most of Western Europe, Poland is still experiencing a linear progression of the epidemic. Despite this, almost all lockdown measures have been removed, as the presidential election is just around the corner. The quarantine obligation applies to substantially fewer people, but the measures of its enforcement remain unchanged.

Regrettably, not much attention seems to be given in the public debate to these legally dubious measures described in this contribution, and the potential threats they may entail. This is disappointing, considering how often the call for the restoration of the rule of law is being repeated in the ongoing presidential campaign. It is hard to imagine that in a democratic state ruled by a constitution and a respect for fundamental rights, any extraordinary powers gained during a pandemic would be anything other than temporary.

References

1. See: <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000374/O/D20200374.pdf>
2. This is the number of legal acts found with the search engine of the *Journal of Laws* on June 17, 2020, that referred in their scope to the term 'COVID-19'. See: <http://dziennikustaw.gov.pl/szukaj>
3. See: <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20082341570/U/D20081570Lj.pdf>
4. Art. 2 indent 12 of the Act of 2008.
5. See: <http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000434>
6. See: <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000658/O/D20200658.pdf>
7. See Art. 7e of the COVID-19 Act as amended on March 31, 2020, Dz.U. item 567: <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000374/U/D20200374Lj.pdf>
8. Though many cases have been reported of police checking people's presence in the traditional manner, despite use of the app. See: <https://www.abc.net.au/news/2020-04-25/coronavirus-poland-tracking-quarantine-selfie-app/12173884>
9. For more on the functioning of the app, see: <https://www.cbsnews.com/news/coronavirus-update-poland-quarantine-app-asks-selfies-to-prove-isolation-social-distancing-police-patients>
10. The privacy policy exists as one, rather short, paragraph in the app's terms and conditions, see: <https://www.gov.pl/attachment/0e28593f-46f3-4460-9b3c-a00b909ffb18>
11. For analysis of the problem of the purpose of processing and the choice of the legal basis, see: Brewczyńska, M. (2020) Report: The Polish Government's Actions to Fight Covid-19: A Critical Look at the 'Selfie App' and Direct Access to Location Data. *European Data Protection Law Review* 6 (2): 301-307. DOI: <https://doi.org/10.21552/edpl/2020/2/17>
12. See: <https://panoptikon.org/pandemia-lokalizacja>
13. See: <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20041711800> as amended
14. Art. 11f. See: <http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000695>

15. The compliance of the derogation introduced into the Polish Telecommunication Act with the exception provided for in Art. 15 of the e-Privacy Directive (Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) [2002] O.J L 201/37) seems problematic. One reason being the lack of reference to the protection of 'public health' in the catalogue of purposes that may justify interference with the general rule.
16. See: <http://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20200000695/O/D20200695.pdf>
17. The Constitution of the Republic of Poland of 2 April 1997 [1997] Dz.U. No 78 item 483.
18. See: <https://verfassungsblog.de/an-emergency-by-any-other-name-measures-against-the-covid-19-pandemic-in-poland>
19. The coronavirus outbreak hit Poland amid a presidential campaign. The election was originally scheduled for May 10, 2020, and subsequently rescheduled to June 28, 2020. The declaration of the state of emergency would result in further delay, given that according to Art. 228 par. 7 of the constitution, during a period of introduction of extraordinary measures, as well as within 90 days following its termination, elections for the presidency cannot be held. Furthermore, during a period of introduction of extraordinary measures the Act on Elections to the Presidency must not be subject to change. In light of the dynamics of the situation, increasing fatigue with the lockdown measures, and increasingly uncomfortable questions regarding the management of the crisis, Poland's ruling party Law and Justice (PiS), which supports re-election of the current President Andrzej Duda, has repeatedly refused to declare the state of emergency.
20. Art. 31 of the constitution.
21. Art. 31 par. 3 of the constitution.